

CHERRY HILL DEVELOPMENT
v.
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 88-655, 86-387

Decided March 28, 1989

Motion to set aside an order suspending consideration of a decision by Administrative Law Judge David Torbett; petition for discretionary review. NX 4-64-R, NX 5-26-R, NX 5-9-P.

Motion granted; petition denied.

1. Surface Mining Control and Reclamation Act of 1977: Generally--Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Scope of Review--Surface Mining Control and Reclamation Act of 1977: Appeals: Effect of

Enforcement action taken to compel compliance with regulations implementing SMCRA provision requiring removal of highwalls constitutes exercise of OSMRE's police or regulatory power and Departmental review of such action is not stayed by the filing of a bankruptcy petition.

2. Surface Mining Control and Reclamation Act of 1977: Appeals: Generally--Appeals: Generally

Pursuant to 43 CFR 4.1270(b), a petition for discretionary review of a decision of an Administrative Law Judge disposing of a civil penalty proceeding which is not timely filed must be denied.

APPEARANCES: Charles J. Baird, Esq., Pikeville, Kentucky, and Katherine A. Adams, Esq., Lexington, Kentucky, for appellant; J. Nicklas Holt, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Knoxville, Tennessee, for Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE KELLY

By order dated November 7, 1988, the Board, pursuant to notification by counsel for Darius and James Sullivan, d.b.a. Cherry Hill Development (Cherry Hill), that the continuation of any administrative proceeding against the Sullivans was automatically stayed pursuant to 11 U.S.C. | 362(a) (Supp. IV 1986) because they had filed for bankruptcy under

Chapter 11 of Title 11 of the U.S. Code, suspended consideration of consolidated appeals docketed as Cherry Hill Development v. Office of Surface Mining Reclamation and Enforcement (IBLA Nos. 88-655 and 86-387) pending dissolution of the stay.

On January 3, 1989, the Office of Surface Mining Reclamation and Enforcement (OSMRE) requested the Board to set aside its November 1988 order, contending that the Board's adjudication of the instant appeals is not automatically stayed by 11 U.S.C. | 362(a) (Supp. IV 1986). Rather, OSMRE contends that, where this proceeding involves OSMRE's exercise of its "police or regulatory power" under the Surface Mining Control and Reclamation Act of 1977 (SMCRA), as amended, 30 U.S.C. || 1201-1328 (1982), the proceeding is expressly exempt from the automatic stay in accordance with 11 U.S.C. | 362(b) (1982). In support thereof, OSMRE cites the legislative history of this statutory provision and the case of Penn Terra Ltd. v. Department of Environmental Resources, 733 F.2d 267 (3rd Cir. 1984), which OSMRE terms the "leading case in the area of governmental enforcement of coal mine reclamation laws." Counsel for the Sullivans has filed no response to OSMRE's motion.

[1] After further review, we conclude that the present proceeding constitutes the "continuation of * * * [a] proceeding by a governmental unit to enforce such governmental unit's police or regulatory power," and, thus, is not stayed by the filing of the bankruptcy petition under the terms of 11 U.S.C. | 362(b) (1982). We conclude that the enforcement actions undertaken by OSMRE to compel compliance with the relevant provisions of SMCRA and its implementing regulations regarding the elimination of highwalls at Cherry Hill's minesite constitute the exercise of OSMRE's "police or regulatory power." See S. Rep. No. 989, 95th Cong., 2d Sess. 52, reprinted in 1978 U.S. Code Cong. & Admin. News 5787, 5838; Penn Terra Ltd. v. Department of Environmental Resources, supra at 274 n.7.

Accordingly, we hereby grant OSMRE's motion to set aside the Board's November 1988 order suspending consideration of the above-captioned appeals. However, we indicated in that order that, upon notification of dissolution of the stay, OSMRE would be permitted to file a brief in support of its appeal docketed as IBLA No. 88-655, whereupon Cherry Hill would have 30 days to respond thereto. Likewise, where we now set aside our order and proceed to adjudicate both appeals, we will accord OSMRE an opportunity to file any desired brief in support of its appeal and Cherry Hill an opportunity to respond thereto. Therefore, upon receipt of this order, OSMRE will have 30 days to file a brief in support of its appeal, whereupon Cherry Hill will have 30 days from receipt thereof to file any desired response. 1/

1/ This briefing schedule should afford OSMRE ample time to submit reasons in support of its appeal, consistent with its motion for an extension of time, filed with the Board on Oct. 7, 1988.

We now address OSMRE's notice of appeal, filed September 6, 1988, of a July 28, 1988, decision of Administrative Law Judge David Torbett (IBLA No. 88-655) to the extent that it also constitutes a petition for discretionary review pursuant to 43 CFR 4.1270(a). In its filing, OSMRE specifically objects to Judge Torbett's ruling that OSMRE could not properly assess a civil penalty with respect to notice of violation (NOV) No. 84-83-052-003, issued by OSMRE on July 11, 1984, consistent with 30 CFR 700.11(c).

[2] The record establishes that OSMRE had originally proposed the assessment of a civil penalty in connection with that NOV and that Cherry Hill had petitioned the Hearings Division, Office of Hearings and Appeals, for review of the proposed civil penalty. That case was docketed by the Hearings Division as NX 5-9-P and assigned to Judge Torbett for a hearing and decision. In a January 17, 1986, decision, at page 5, Judge Torbett, after having reduced to 20 the number of points assigned under 30 CFR 723.13(b), concluded that "no civil penalty should be assessed," and set aside the proposed penalty. See 30 CFR 723.12(c); Lone Star Steel Co. v. OSMRE, 98 IBLA 56, 67 (1987). There is no record that OSMRE petitioned for discretionary review of Judge Torbett's January 1986 decision pursuant to 43 CFR 4.1270(a), prior to receipt of the current petition. 2/

Departmental regulation 43 CFR 4.1270(b) provides that a petition for discretionary review of a decision of an Administrative Law Judge disposing of a civil penalty proceeding "shall be filed on or before 30 days from the date of receipt of the * * * decision sought to be reviewed." In the present case, Judge Torbett's January 1986 decision disposed of the civil penalty proceeding with respect to the subject NOV. The record establishes that that decision was received by OSMRE on January 21, 1986. Since no petition was received until September 6, 1988, it is clear that OSMRE failed to file a petition for discretionary review of Judge Torbett's disposition of the civil penalty proceeding within 30 days of receipt of the decision. The timely filing of a petition for discretionary review will be treated as jurisdictional. Cf. 43 CFR 4.1151(c) (discussed in 51 FR 16319 (May 2, 1986)); Hopi Tribe v. OSMRE, 103 IBLA 44 (1988); C & K Coal Co., 1 IBSMA 118, 86 I.D. 221 (1979).

2/ The only challenge to Judge Torbett's January 1986 decision was raised by Cherry Hill with the filing on Feb. 21, 1986, of what was styled a petition for discretionary review. However, for obvious reasons, Cherry Hill did not object to Judge Torbett's January 1986 decision to the extent that he set aside the proposed civil penalty. Rather, the petition objected to the decision only to the extent that Judge Torbett sustained OSMRE's issuance of the NOV and a cessation order. Thus, the petition cannot be considered a petition for discretionary review of "[a] decision by an administrative law judge disposing of a civil penalty proceeding," pursuant to 43 CFR 4.1270(a), but, rather, must be considered a notice of appeal "from * * * [a] decision of an administrative law judge disposing of a proceeding * * * except a civil penalty proceeding," pursuant to 43 CFR 4.1271(a). It will henceforth be regarded as a notice of appeal. Cherry Hill's appeal is the appeal docketed by the Board as IBLA No. 86-387.

It might be argued that OSMRE should also be entitled to seek discretionary review of Judge Torbett's July 1988 decision to the extent that it also decided the question of whether OSMRE properly assessed a civil penalty with respect to the NOV and, thus, its petition should be considered as filed timely. However, final disposition of the civil penalty proceeding within the meaning of 43 CFR 4.1270(a) occurred as a result of Judge Torbett's January 1986 decision where no petition for discretionary review of that disposition was filed timely by either OSMRE or Cherry Hill. In these circumstances, the matter is entitled to repose. Turner Brothers Inc. v. OSMRE, 102 IBLA 111, 121 (1988).

Accordingly, we conclude that OSMRE's petition for discretionary review of Judge Torbett's July 1988 decision, to the extent that it concluded that OSMRE was precluded from assessing a civil penalty under 30 CFR 700.11(c), must be denied. OSMRE is barred from raising the question of the propriety of the assessment of the civil penalty in connection with its present appeal.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, OSMRE's motion to set aside the Board's November 1988 order suspending consideration of the above-captioned appeals is granted, and OSMRE's petition for discretionary review of Judge Torbett's July 1988 decision concluding that OSMRE did not have the authority to assess a civil penalty for NOV No. 84-83-052-003 is denied.

John H. Kelly
Administrative Judge

I concur:

Franklin D. Arnese
Administrative Judge